IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,

Petitioners,

v.

ROBERT FINNEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JACK GREENBERG
STANLEY A. BASS
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

PHILIP E. KAPLAN
622 Pyramid Life Building
Little Rock, Ark. 72201

Attorneys for Respondents

TABLE OF CONTENTS

Authorities Cited

Cases

Constitutional Provisions

Statutes

Text

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1660

TERRELL DON HUTTO, et al.,

Petitioners,

v.

ROBERT FINNEY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Does the Civil Rights Attorney's Fees Awards Act of 1976 apply to cases pending on appeal on the date of its enactment, and does the Act authorize an award of attorneys' fees against a state department of correction?
2. Does the Eleventh Amendment bar an award of attorneys' fees authorized against a state department of correction by the Civil Rights Attorney's Fees Awards Act of 1976?
3. Was the district court order prohibiting indefinite use of punitive isolation an appropriate means of providing a continuing prophylaxsis against cruel and unusual punishment, found to exist throughout the entire Arkansas prison system?

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. The Decision Of The Court Below Does Not Conflict With Decisions Of This Court Or Other Courts Of Appeals

A. Award of Attorney's Fees

Petitioners' contention that the award of attorney's fees herein is barred by the Eleventh Amendment, and is not authorized by Congress, is refuted by both the Civil Rights Attorney's Fees Awards Act of 1976, and by this Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

The Act, as the court below correctly observed, permits an order, as was entered in this case, requiring the award to be paid directly from the funds of a state agency, such as the Department of Correction, whether or not the agency is a named party.

The Legislative History of the Act explicitly states:

> ... it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).1/

Moreover, the Legislative History further states that "fee awards are ... provided ... in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5." Ibid. Accordingly, under this Court's decision in Fitzpatrick v. Bitzer, supra, no Eleventh Amendment bar exists.

1/ Civil Rights Attorney's Fees Award Act of 1976, Source Book: Legislative History, Texts, And Other Documents, p. 5 (1976).

Finally, the Legislative History of the Act makes it clear that Congress intended that the rule of Bradley v. Richmond School Board, 416 U.S. 696 (1974), apply, and that the Act govern all civil rights cases pending at the time of its enactment.2/

Other courts of appeals have also applied the 1976 Act to civil rights cases pending on appeal at the time of its enactment. See, Martinez-Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977).

B. Indefinite Punitive Isolation

As the court below noted, "This appeal is the latest chapter in the seemingly endless litigation involving the constitutionality of the Arkansas state prisons." 548 F.2d, at 741.

District Judge Henley's order, limiting the use of indefinite punitive isolation was not made on a bare record, or in a vacuum, but rather, in accordance with the court of appeals' mandate, after several years of litigation, "to eliminate the unlawful conditions which now exist in the Arkansas prison system." Finney v. Arkansas Board of Corrections, 505 F.2d 194, 214 (8th Cir. 1974).3/

The court of appeals referred to "[t]he continued infliction of physical abuse, as well as mental distress, degradation,

---

2/ Source Book, supra, at 202 (Senate Debate); 212, n. 6 (House Report).

3/ The court of appeals had observed: "[We] confront a record and factual history of a sub-human environment, in which individuals have been confined under the color of state law." Id., at 215.

and humiliation by correctional authorities." Id. at 206.

> Such unlawful conduct by correctional personnel is of major significance leading to this Court's finding that the present correctional system in Arkansas is still unconstitutional ... [T]he District Court shall retain jurisdiction and take, if it deems advisable, additional evidence on those conditions of confinement ... and disciplinary measures which must be changed in order to provide a continuing prophylaxsis against such cruel and inhumane treatment." Id.

The court of appeals explicitly directed the district court to amend its decree "to ensure that prisoners placed in punitive solitary confinement are not deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet." Id., at 207-08.

On remand, the district court held additional hearings, and entered several orders relating to Arkansas prison disciplinary measures.[4/] The only portion appealed from concerned the prohibition against committing prisoners to punitive segregation for indefinite periods of time.

In light of the entire background of this matter, the evidence, and the court of appeals' mandate "to provide a continuing prophylaxsis against such cruel and inhumane treatment," supra, the district court's ruling on this point was correctly affirmed.

At the outset, the distinction should be noted between segregated confinement under maximum security conditions, and

---

4/ For example, the feeding of "grue "was finally restrained. Also, the trial court enjoined confinement of more than two men at a time in one punishment cell, and required that each person have a bunk. 410 F. Supp. at 277.

-4-

segregated confinement under the punitive conditions actually existing in the Arkansas correctional system. The district court's order in question merely placed a maximum of 30 days confinement in punitive confinement.

> If at the end of that maximum period, it is found that an inmate should not be returned to population, he may be kept segregated but under conditions which are not punitive. 410 F. Supp. at 278.

It is clear, therefore, that prison officials still retain authority to segregate chronic troublemakers from the rest of the prison population. Such prisoners can initially be placed in punitive confinement for up to 30 days, and then, if they persist in misbehaving, they can be kept segregated, but under less punitive conditions. However, gratuitous cruelty, i.e., forcing inmates to endure indefinitely while cramped into an "extremely small cell," which is "equipped with extremely limited facilities," usually with at least one other inmate, and at times three or more inmates kept in the same cell, has, as a matter of basic humanity, been limited. 410 F. Supp. at 275.

The trial court realistically noted the vicious cycle of violence perpetuated by the Arkansas style of indefinite punitive segregation, both as to guards and inmates, whose end product serves no rehabilitation purpose, and is counterproductive. Making bad men worse cannot possibly serve any legitimate state interest. 410 F. Supp. at 276-77.

> [T]he Court sincerely believes that these changes are not only constitutionally required, but also that they will produce both a more humane prison system and a system that is going to be more peaceful and orderly and easier to administer efficiently in the long run. 410 F. Supp. at 278.

-5-

Petitioners' attempt to rely upon the Second and Fifth Circuits' rulings, in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); and Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), is misplaced since neither New York's nor Texas' entire correctional system had previously been declared unconstitutional, in contrast to the unfortunate situation in Arkansas. The order entered in this case cannot properly be evaluated in isolation, but rather, must be viewed in context, i.e., as one of many facets of relief "to provide a continuing prophylaxsis against such cruel and inhumane treatment," 305 F.2d at 206.

The trial judge, who heard the facts, and acting pursuant to the court of appeals' mandate, entered an appropriate order designed to bring the Arkansas correctional system back on the road toward a constitutional level. Under all of the circumstances, his judgment was correct, and was properly sustained.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

September, 1977

JACK GREENBERG
STANLEY A. BASS
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

PHILIP E. KAPLAN
622 Pyramid Life Building
Little Rock, Ark. 72201

Attorneys for Respondents

5-